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No. 80-1348

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE, *Petitioner*

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP., *Respondents.*

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Where property in custody of state employees is ordered seized in a maritime *in rem* proceeding by process from the federal district court, does the court, upon the assertion of the Eleventh Amendment by the State, have the power to determine as a jurisdictional fact whether the State is the owner and entitled to possession, and, if not, hold the Eleventh Amendment is no bar?

Note: The wording of Petitioner Florida's *two* Questions Presented neither accurately reflects the basis of the holding of the court of appeals below nor the *single* Question Presented in the Petition to which this Court granted Certiorari.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iii

Statement of the Case 1

Summary of Argument 12

Argument:

I. THE ELEVENTH AMENDMENT DOES NOT BAR ARREST OF ARTICLES OF SALVAGE FROM ATOCHA MERELY BECAUSE THE STATE ASSERTS A DISPUTED CLAIM OF OWNERSHIP. 14

A. *The Eleventh Amendment Issues Raised by the Proceeding at Bar Do Not Affect the Fisc of the State.* 14

B. *The Eleventh Amendment Does Not Apply To Rem Actions Where the State is Not the Owner of the Res.* 17

II. FLORIDA HAS WAIVED ELEVENTH AMENDMENT PROTECTION BY STATUE AND BY VOLUNTARY PARTICIPATION IN AN AREA OF FEDERAL PREEMIENCE. 24

A. *The State of Florida Has Waived Its Eleventh Amendment Protection by Express Statutory Consent to Suit in Federal Court.* 25

B. The State of Florida Waived its Eleventh Amendment Protection by Participating in an Area of Traditional and Paramount Federal Regulation. 26

III. THE COURTS BELOW CORRECTLY INTERPRETED UNITED STATES V. FLORIDA WHEN THEY FOUND THAT THE WRECK SITE OF THE ATOCHA IS NOT LOCATED ON SOVEREIGNTY SUBMERGED LANDS. 33

IV. TREASURE SALVORS I, VESTING TITLE TO THE ATOCHA SALVAGE IN PLAINTIFFS, BINDS THE STATE SINCE IT WAS IN PRIVITY WITH THE UNITED STATES AND FAILED TO INTERVENE. 39

V. THE PUBLIC INTEREST IS BETTER SERVED BY TREASURE SALVORS OBTAINING POSSESSION. 42

Conclusion 49

TABLE OF AUTHORITIES

Cases

Askew v. American Waters Operations,
411 U.S. 325 (1973) 29

Broere v. Two Thousand, One Hundred Thirty-Three Dollars,
72 F.Supp. 115 (E.D.N.Y. 1947) 25

Chesapeake Bay Bridge and Tunnel District v. Lauritzen,
404 F.2d 1001 (4th Cir.1968) 28

Clyde Mallory Lines v. Alabama,
296 U.S. 261 (1935) 29

Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Saling Vessel
(No. 79-8266-Civ JKL-S.D. Fla.-Order, October 2, 1981) 46

Edelman v. Jordan,
415 U.S. 651 (1974) 16, 26, 27, 28

Employees v. Missouri Department of Public Health and Welfare,
411 U.S. 279 (1973) 28

Ex parte New York, (No. 1)
256 U.S. 490 (1921) 17, 30

Ex parte Young,
209 U.S. 123 (1908) 12, 16, 27

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 16

Florida Department of Health and Rehabilitative Service v. Florida Nursing Assn.,
101 S.Ct. 1032 (1981) 15, 23, 26, 27

Gardner v. New Jersey,
329 U.S. 565 (1947) 31

Housman v. The Schooner North Carolina,
40 U.S. (15 Pet.) 40 (1841) 33

Hutto v. Finney,
437 U.S. 678 (1978) 16

In re Muir
254 U.S. 522 (1921) 21

In re New York (The Queen City),
256 U.S. 503 (1921) 12, 18

Maher v . Gagne,
488 U.S. 122 (1980) 16, 27

Maryland v. Louisana,
101 S.Ct. 2114 (1981); Supplemental Order, 101 S.Ct. 3075 (1981) 27, 29

Milliken v. Bradley,
433 U.S. 267 (1977) 16

Montana v. United States,
440 U.S. 147 (1979) 40, 42

O'Neill v. Schoenbroad,
374 So.2d 70 (Fla.Dist.App.1979) 33

O'Neill v. Schoenbrod,
355 So.2d 400 (Fla.DistCt.App.1978) 33

Parklane Hosiery Co. Inc. v. Shore,
439 U.S. 322 (1979) 42

Parden v. Terminal Railway,
377 U.S. 184 (1964) 14, 27, 28, 31

Petty v. Tennessee-Missouri Bridge Commission
359 U.S. 275 (1959) 16, 26

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 21

Rickard v. Pringle,
293 F.Supp. 981 (E.D.N.Y. 1968) 25

Seaside Properties, Inc. v. State Road Department,
121 So.2d 126 (Fla.Dist.Ct.App. 1973) 26

Skioriotes v. Florida,
313 U.S. 69 (1941) 35

Southern Pacific Co. v. Jensen,
244 U.S. 205 (1917) 30, 32

Standard Oil Co. v. United States,
25 F.2d 480 (S.D.Ala.1928) 27

State of Florida Department of State v. Treasure Salvors, Inc. (Treasure Salvors II),
621 F.2d 1340 (5th Cir.1980) - Appendix to Petition for Certiorari (App.Pet.Cert.) 6-60 passim

State Road Department of Florida v. Tharp,
1 So.2d 868 (Fla.1941) 24, 26

Sturgis v. Law and St. John,
5 Barb 451 (N.Y.App.Div.1850) 33

The Navemar,
303 U.S. 68 (1938) 20, 21

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, (Treasure Salvors I)
569 F.2d 330 (5th Cir. 1978) 2, 3, 4, 5, 6 14, 21, 35, 39, 41, 42

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,
459 F.Supp. 507 (S.D. Fla. 1978) - Appendix to Certiorari (App.Pet.Cert.) 61-163 passim

Treasure, Salvors,Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,
408 F. Supp. 907 (S.D. Fla. 1976) 2, 5

United States v. California,
332 U.S. 19 (1947) 36

United States v. Florida,
420 U.S. 531 (1975) 4, 9, 22, 34, 36, 38

United States v. Lee,
106 U.S. 196 (1882) 12, 17, 22, 23, 24

United States v. Louisiana,
339 U.S. 699 (1950) 36

United States v. Maine
420 U.S. 515 (1975) 37

United States v. Texas,
339 U.S. 707 (1950) 37, 38

Wiggins v. 1100 Tons, More of Less, of Italian Marble,
186 F.Supp. 452 (E.D.Va.1960) 25

Constitutional Provision

U.S. Const. art.I, §8,cl.3 29
U.S. Const. art. III, §2 29
U.S. Const. art. VI, cl.2 29
U.S. Const. Amendment Eleven passim
Fla. Const. art. X, §13 (1979) 25

Treaty

Convention on Certain Rules Relating to Assistance Salvage at Sea, Signed, 1910 29

Statory Provisions

28 *U.S.C.* §1333 29
42 *U.S.C.* §722 29
43 U.S.C. §1314 37
Fla. Stat. §69.041 (1) (b) 14, 26
Fla. Stat. §267.061 (1) (b) 3, 10, 13, 25, 30, 34, 35

Miscellaneous Authorities

Report of Albert B. Maris, Special Master, *United States v. Florida* (No. 52 Original, January 18, 1974) 34, 36, 37

Friedman, *Capitalism and Freedom,* U.Chi.1962) 46, 47

Gores, *Marine Salvage* (Doubleday 1971) 47

Lyon, *The Search for the Atocha* (Harper and Rowe 1979) *44*

Norris, *Law of Salvage,* Section 157 (1974 Cumulative Supplement) 33

Shore, *Marine Archaeology and International Law: Background and Some Suggestions,* 9 *San Diego L. Rev.* 668 (1972) 47, 48

Smith, *An Inquiry Into the Nature and Cause of the Wealth of Nations* (U.Chi. Britannica ld. 1952) 45

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Hote, *Cultural Resources Preservation and Underwater Archaeology: Some Notes On the Current Legal Framework and a Model Underwater Antiquites Statute,* 15 *San Diego L. Rev.* 623 (1978) 38, 41

No. 80-1348
IN THE
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STATE OF FLORIDA
DEPARTMENT OF STATE,
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—vs.—

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Certiorari has been granted on the second of two appeals concerning the application of the Eleventh Amendment to the maritime seizure of certain articles of salvage recovered

from a wrecked Spanish galleon.* The Respondents, Armada Research Corp. and Treasure Salvors, Inc. (hereinafter Treasure Salvors), located the wreck of the *Nuestra Senora de Atocha* (hereinafter the *Atocha*) which was lost during a 1622 hurricane. (App.Pet.Cert. 8-17, 65). Treasure Salvors recovered thousands of articles of salvage of substantial value through an arduous, prolonged, and *still* continuing effort undertaken at great cost, including the loss of several lives. (App. Pet. Cert. 65-66). In general see documentary film of National Geographic Society, Exhibit 10, admitted R.v. IV 233.**

Beginning in 1968 Treasure Salvors started a physical search for the *Atocha* south of the Matecumbe Keys located midway from Miami to Key West. In addition to the search, Treasure Salvors initiated extensive research in the Archives

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**State of Florida Department of State v. Treasure Salvors, Inc. (Treasure Salvors II)*, 621 F. 2d 1340 (5th Cir. 1980), set out in *Appendix to Petition for Certiorari* (App. Pet. Cert.) 6-60, affirming, *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978), (App. Pet. Cert. 61-163). The first appeal *(Treasure Salvors I) Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 21 330 (5th Cir. 1978) affirmed with modification *Treasure Salvors Inc. v. Abandoned Sailing Vessel*, 408 F. Supp. 907 (S.D. Fla. 1976).

**Transcript of the evidentiary hearing of July 27, 1978 is referred to as "R.v. III", transcript of July 28 as "R.v. IV"; on supersedeas bond, September 8, 1978 as "R.v. V."

of the Indes in Seville, Spain. The results of this research caused the physical search to be moved in 1970 to an area of ocean nearly forty miles west of Key West, Florida, where the wrecked vessel was eventually located on the outer continental shelf and salvage commenced. (App. Pet. Cert. 37). Treasure Salvors indicated by a letter sent in 1970 to agents of the State of Florida (R.v.III 55-57) that the area (in the Atlantic, approximately 11 miles west of the nearest land, the Marquesas Keys) was outside state boundaries. (R.v.IV 34-35).

Nevertheless after Mel Fisher, the President of Treasure Salvors and the leader of the expedition, had recovered a gold chain, agents of the State of Florida appeared and "threatened to put me [Mel Fisher] in jail, confiscate all my boats and magnetometers and stop me from working completely unless I had a salvage contract." (R.v.III 60-61). The trial court found that the contract signed on April 26, 1971 had been obtained by coercion and thus void. (App.Pet.Cert. 123). This finding was not challenged on appeal.

The salvage contracts, as authorized by Chapter 267*, Florida Statutes, were expressly predicated upon the wreck site being on sovereign submerged lands of the State. (J.A. 20-21); App.Pet.Cert. 126-127). Chapter 267 only authorized the State to contract with regard to salvage on sovereign bottoms. The contracts had various forfeiture provisions under which the Division of Archives, History and Records Management, Department of State of Florida (hereinafter State or Division), could claim the entire salvage. (App.Pet.Cert. 76). The State retained *all* items salvaged by Treasure Salvors during the salvage seasons of 1971 through

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* §267.061 (1) (b) . . . which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state.

1975 and although repeated requests were made by Treasure Salvors to divide the salvage, the State refused. (App.Pet.Cert. 76). The contracts were renewable on an annual basis, but because of the forfeiture clause and the refusal of the State to divide the articles of salvage, Treasure Salvors had to renew the contracts or suffer total forfeiture of all articles of salvage recovered. (J.A. 38; App.Pet.Cert. 76). The trial court found that the State of Florida intended to keep *all* of the salvage, and this finding was not challenged on appeal. (App.Pet.Cert. 76).

After the Special Master's Report was filed in February, 1974 in *United States v. Florida,* 420 U.S. 531 (1975), determining the boundary line of State of Florida to be landward of the wreck site, Mr. Fisher suggested he would be willing to donate to the State a substantial portion of the salvage. Still the State refused any division and kept possession of the entire recovery. (App.Pet.Cert. 17,76, 77). It was only after the oral argument before this Court in February, 1975, that the State, apparently recognizing it could lose all, proceeded to divide the treasure (a few days prior to this Court's decision) and take its purported twenty-five percent share. (App.Pet.Cert. 77). Most, but not all of the articles of salvage recovered by Treasure Salvors and in possession of the State were divided. (Ex.9, R.v. IV 44-46). The salvage efforts of Treasure Salvors have continued.

Shortly after the announcement of the Supreme Court's opinion in *United States v. Florida,* which affirmed the Special Master's Report as to the location of Florida's boundaries and its lack of ownership of the submerged lands under and around the wreck site, Treasure Salvors instituted the *in rem* admiralty and maritime proceeding in the United States District Court for the Southern District of Florida, seeking confirmation of title to the *Atocha* and *all* articles of salvage recovered, as finders and, in the alternative, seeking a salvage award of the highest order. (J.A. 5-10; App.Pet.Cert. 17-18). Although both the United States and Florida had

notice of the proceeding, they negotiated and only the United States appeared. (App.Pet.Cert. 18-19, 74, 81, 90). The United States voluntarily submitted itself to *in personam* admiralty jurisdiction and claimed title, under the English rule of Sovereign Prerogative and the Federal Abandoned Property and Antiquities Acts, to *all* of the articles of salvage that had been recovered from the *Atocha,* including those now claimed by the State of Florida and the subject of the present proceedings. *Treasure Salvors I,* 569 F. 2d 330 (5th Cir. 1978).

Treasure Salvors was appointed substitute custodian of the articles of salvage arrested by the United States Marshal in the Southern District and continued to recover substantial articles of salvage from the *Atocha.* (App.Pet.Cert. 21n.15, 37n. 24).

The State of Florida closely monitored the proceeding, but chose not to formally intervene, inasmuch as it had negotiated with the United States to protect its claim to the salvaged articles in its possession. (App.Pet.Cert. 18-19, 74-75, 81-82). The trial court noted that the State, being frustrated in its scheme to obtain the entire treasure under its coerced contracts, encouraged the United States to claim ownership of the *Atocha* and articles of salvage, to the total exclusion of Treasure Salvors. (App.Pet.Cert. 77-78).

The United States District Court ruled against the various claims of the United States and held that Treasure Salvors had finders' title to the *Atocha* and all articles of salvage recovered therefrom against the United States and all the world, *Treasure Salvores vs. Unidentified Wrecked and Abandoned Sailing Vessel,* 408 F. 907 (S.D. Fla. 1976). The United States and Treasure Salvors recognized, and the court determined, that the wreck site was on the continental shelf in international waters outside the three mile boundary of the United States. *Treasure Salvors vs. Unidentified Wrecked and Abandoned Sailing Vessel,* 408. F. Supp. at 909. On appeal, the rejection of the claim of the United States was affirmed and title was upheld in Treasure Salvors as against the United States and *privies* to the litigation, but that

portion of the trial court's opinion that had granted title against the world was modified. *Treasure Salvors I,* 569 F. 2d 330 (5th Cir. 1978). This order of the court of appeals became final (the United States did not seek review in the Supreme Court.)

Following the issuance of the mandate from the Fifth Circuit in *Treasure Salvors I, supra,* the ancillary warrant of arrest in question was issued by the trial court to seize the articles of salvage in the custody of named employees of the Petitioner State of Florida. (J.A. 40; App.Pet.Cert. 19). The trial court expressly noted that the ancillary warrant of arrest and proceeding thereon were based upon the original complaint and *not* the supplemental Complaint for Declaratory Relief that was subsequently dismisssed. (App.Pet.Cert. 70, 147). The State filed a Motion to Quash the warrant of arrest in the district court and at the same time filed an Emergency Petition for Writ of Prohibition or Stay in the Fifth Circuit (J.A. 43; App.Pet.Cert. 20). The Fifth Circuit issued a temporary stay which was subsequently dissolved and denied the petition for prohibition. (J.A. 65; App.Pet.Cert. 20). The Fifth Circuit subsequently denied a Petition for Reconsideration filed by the State. (J.A. 69; App.Pet.Cert. 105). In denying the Petition for Reconsideration, the court stated that *the question of jurisdiction was initially for the trial court* to decide. (J.A.69;App.Pet.Cert.105). The trial court denied the Motion to Quash, but stayed execution temporarily, pending the outcome of the temporary stay in the Fifth Circuit and accordingly issued an Order to Show Cause under Supplemental Admiralty Rule C(5) (J.A. 51-64, 70-77; App.Pet.Cert. 20-21). The papers filed by the State in the Fifth Circuit did not raise the Eleventh Amendment issue, but this issue was asserted subsequently in the trial court in reference to the Order to Show Cause, together with an affirmative claim on the merits by the State to ownership of the articles of salvage in question. (J.A. 51; R.v. III & IV).

At the hearing on the Order to Show Cause, which is the matter now before this Court, the trial court afforded the parties a full evidentiary hearing on the jurisdictional issues and the merits, including the contention of the State of Florida that the proceeding was precluded by the Eleventh Amendment. (App.Pet.Cert. 21-22, R.v. III & IV). Judgment was entered in favor of Treasure Salvors. (J.A. 84-85; App.Pet.Cert. 21-22). The trial court summarized its extensive findings of fact and conclusions of law thusly:

> For the reasons that follow, this Court holds: it had jurisdiction to issue the warrant for arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

(App.Pet.Cert.64).

The trial court's holding that the State of Florida was bound, as being in privity with the United States and for failure to intervene, by the previous ruling in *Treasure Salvors I,* was noted by the court of appeals, but it expressly declined to approve or disapprove the holding, "saving it for another day." (App.Pet.Cert. 23, n. 17).

In reference to the Eleventh Amendment, the trial court made several jurisdictional findings of fact including the finding that "the Division of Archives is not and never was the owner of the ship *Atocha,* her tackle, apparel, cargo, etc." (App.Pet.Cert. 150). The trial court further found that employees of the State of Florida had wrongfully taken and withheld possession of the articles of salvage. (App.Pet.Cert. 150).

The jurisdictional findings of the trial court were affirmed by the Fifth Circuit:

> In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, *see* pp.1348-1349, *infra,* we affirm the judge's holding that the order to show cause is not, in this case, a suit against the state.

(App.Pet.Cert.29).

The dissenting opinion contended that once the State asserted a mere claim of ownership, jurisdiction of the federal court was barred by the Eleventh Amendment. (App.Pet.Cert. 54). The majority opinion affirmed the holding of the trial court that the question of ownership was a jurisdictional fact that, being in dispute, should be determined by the court. (App.Pet.Cert. 28).

Florida's claim of ownership was predicated upon Chapter 267 of the Laws of Florida which expressly required the salvage to be on state-owned sovereignty submerged lands. (App.Pet.Cert. 126-127). The trial court specifically found the wreck site *not* to be on Florida sovereignty submerged lands. The court stated:

> The portion of the *res* seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located *outside* the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061 (1)(b), Florida Statutes, which purports to vest title in the State *does not apply* since the property was not on "sovereignty lands of the State."

(App.Pet.Cert.117).

Florida's claim to an ownership interest because of a purported salvage contract between Treasure Salvors and the

State of Florida was rejected by the trial court on *five* different grounds. The salvage contract was invalid, *first,* because it had been obtained through coercion by threats of arrest and confiscation of salvage equipment. (App.Pet.Cert. 123). *Second,* that it was *ultra vires* because Chapter 267 only authorized the State to enter into salvage contracts on state-owned sovereignty submerged lands (the statute was acknowledged in the contract itself as the sole authority for entering into the agreement). (App.Pet.Cert. 126). *Third,* there had been a mutual mistake of fact in reference to the location of the wreck site on state sovereignty submerged lands. (App.Pet.Cert. 45-47, 124). *Fourth,* there was a total want or failure of consideration as the wreck site was not on state-owned sovereignty submerged lands. (App.Pet.Cert. 48, 124-128). *Fifth,* the State by reason of misconduct and breach of fiduciary duty, forfeited any rights it might have had under the salvage contract. (App.Pet.Cert. 130-132).

On appeal, the State's contention as to ownership of articles of salvage was restricted to the argument that the wreck was on state-owned sovereignty submerged lands as provided by Chapter 267 at the time of the execution of the salvage contracts, because *United States v. Florida,* 420 U.S. 531 (1975) did not apply or, if applicable, could not be applied retroactively. (State Appellate Brief No. 78-2950, 5th Cir. pp. 12-16, 46-47). This position was rejected by the appellate court. (App.Pet.Cert. 17-18, 49).

In its Fifth Circuit Brief, Florida did *not* contest that the contract was invalid because of coercion and because of misconduct. Neither did the State question that reccission was a proper remedy for the mistake of fact, want of consideration and *ultra vires* defects, *if* the wreck site was determined to be *not* on state-owned submerged lands at the time the contracts were executed. Florida also did not contest that the wreck site was *now* located outside the boundaries of the State of Florida, as defined by this Court in *United States v. Florida.* (State Appellate Brief No. 78-2950, 5th Cir.).

The trial court also held that the State performed no salvage service of value (App.Pet.Cert. 69), which finding was not contested on appeal. In addition, the trial court doubted that the State of Florida could have ever located the *Atocha*, much less have salvaged it. (App.Pet.Cert. 69).

As an express *alternative* holding, the trial court stated Chapter 267 was unconstitutional for several reasons. (App.Pet.Cert. 136-141). This issue was not considered in the court of appeals' decision to which this Court granted certiorari on the sole issue of the Eleventh Amendment.

The interest in archaeology and in preserving the heritage of the State of Florida, expressed throughout the State's brief in this Court and in the Amici Brief were *not* discussed in the appellate opinion below on the issue of whether the arrest of salvage articles recovered from a wrecked vessel outside of Florida's boundaries was barred by the Eleventh Amendment, or in relation to other issues decided by the Court. (App.Pet.Cert. .7-60). The record contains no evidence of any duly promulgated state policy, authorized by Florida laws, regarding the salvage of wrecks of archaeological interest on navigable waters *outside* of state-owned sovereignty submerged lands. Both the trial court and the appellate court recognized that Chapter 267 (§267.061 (1)(b)) by its express term applied only to "state-owned lands or state-owned sovereignty submerged lands." (App.Pet.Cert. 49-50).

The trial court had noted, however, that state employees' interest in extraterritorial wrecks was not sufficient basis to *take* the property.

> The ship *Atocha's* association with Florida is tangential at best and certainly is not integral to the heritage and development of the State. The ship was bound on a voyage from Havana to Cadiz when the storm of 1622 drove it close to, but outside of, the boundaries of the later State of Florida. Its cargo was not connected or associated with the Florida peninsula . . . . Merely because agents of the State covet the treasure, does not give the agents the right to take it in the name of the State.

(App.Pet.Cert.68-69).

Treasure Salvors offered uncontroverted evidence at the evidentiary hearing on the supersedeas bond in reference to their substantial archaeological, historical and public benefit contributions. (R.v.V 10-12, 19-20, 46-48). In contrast, the Division of Archives was found to have deliberately destroyed valuable provenience date, by removing tags which provided the only link between specific artifacts and their spatial relationship on the bottom. (R.v.V 24-25, 40). Thus valuable archaeological information was lost forever, notwithstanding the substantial reconstruction of the information by Treasure Salvors' archaeologists. (R.v. V 43-44).

At this evidentiary hearing, the trial court found that the Director of the Division had filed a false affidavit, (R.v.V 54-55). Also that the Division had not performed its duties under Chapter 267 and had been grossly negligent in its custodial care of the articles of salvage:

> The Court is shocked, very frankly, with the testimony that some 572 items have been lost in a cleaning process, once the articles were in the custody of the State and is especially shocked at the fact that an emerald, among other things, has been lost while in State custody.
>
> The Court finds it extremely difficult to believe that the State has been such a good custodian as it claims to be.

R.v.V 56.

The State of Florida, by its own admission, only exhibited 6 to 9 articles of salvage out of the thousands recovered during the time the entire treasure was in the possession of the State of Florida. (R.v.IV 100). Even subsequently, when an exhibit was being planned for Explorers' Hall at the National Geographic Society headquarters in Washington, D.C. to be opened by the Queen of Spain, the Division of Archives would not loan the mariners astrolabe which had been recovered from the *Atocha* until after the Florida Secretary of State (who has overall control of the Division) was promised

that he would be presented to the Queen. (R.v.V 21-22).

Following the affirmance on appeal, denial of rehearing and the issuance of the appellate mandate, the State of Florida filed a timely Petition for Writ of Certiorari on the *single* question of whether the proceeding was barred by the Eleventh Amendment. This Court granted Certiorari as to such question.

SUMMARY OF ARGUMENT

The maritime arrest of articles of salvage at bar does not constitute a suit against the State of Florida within the meaning of the Eleventh Amendment. Upon the State's assertion of immunity, the federal court should make appropriate jurisdictional findings rather than blindly accepting the assertion by the State as conclusive.

The dissent below complained, and the Petitioner State now complains, that the result is "equivalent to asserting that suits against a state are permitted if the result is that the state loses." (App.Pet.Cert. 55) With due deference, where the suit is to seize property that is not owned by the state and in the custody of state agents who are not lawfully entitled to possession, it is no more a suit against the state than that involved in *Ex parte Young*, 209 U.S. 123 (1908) and its progeny.

The Fifth Circuit affirmed the trial court holding that the federal court had the inherent power to determine the question of its jurisdiction. Not only in admiralty, but in other areas where state agents have had custody of property and seek to include or avoid any determination of ownership by the rightful claimant, this Court has refused to allow the Eleventh Amendment or sovereign immunity to automatically bar relief. *See, e.g., In re New York (The Queen City)*, 256 U.S. 503 (1921) and *United States v. Lee*, 106 U.S. 196 (1882). The principle that the judicial system will determine the appropriate jurisdictional facts governing the application of the Eleventh Amendment is a common thread through this Court's immunity decisions.

The State contended below that the arrest of the articles of salvage in the custody of state agents was a suit against the State because the State was the purported owner. Treasure Salvors had recovered the disputed articles of salvage from a wreck it found on the continental shelf that previously had been judicially determined to be outside the three-mile territorial boundary of the United States, as well as in an area outside the boundary of state submerged lands as determined by this Court.

The State's ownership claim was based on Chapter 267, Florida laws, which expressly limits any basis of any claim of ownership and the power of the State Division of Archives to control and contract for salvage of wrecked vessels located on "state owned sovereignty submerged lands." The wreck lay outside such lands and the trial court further held the purported salvage contract to be of no effect on five separate grounds. The trial court as jurisdictional facts found that the State was never the owner of the *Atocha* or its cargo and that agents of the State without statutory or other authority, had wrongfully taken and withheld possession of the articles of salvage from Treasure Salvors.

Rather than disputing the correctness of the trial court's jurisdictional findings, Petitioner Florida claimed that the mere assertion of the Eleventh Amendment not only bars the action, but ousts the federal court of jurisdiction as well. The history and purpose of the Amendment does not support this interpretation and it would violate Constitutional due process. If countenanced, it would permit a State under the protection of the Federal Constitution to falsely claim itself to be the owner and wrongfully take property.

The State's argument claiming title to wrecked and abandoned vessels on the outer continental shelf outside the three-mile territorial boundary of the United States on the basis that the State of Florida has different boundaries for different purposes is without merit since 1) Florida's statute expressly limits its application to "state-owned sovereignty submerged lands" and no other Florida law purports to claim

the ownership or the right to control salvage of wrecks not located on state-owned submerged land; 2) prior to the 1953 Federal Submerged Lands Act, the State of Florida had no ownership interest whatsoever in any submerged lands seaward of its coast; and 3) the wreck of the *Atocha* was located and salvaged outside the three-mile limit of the boundary of the limited interest in the natural resources of submerged lands that the federal government conveyed to the State.

The State further waived the Eleventh Amendment by statute (F.S. §69.041 (1) (b)) and by participation in an area of federal preeminence. *Parden v. Terminal Railway*, 377 U.S. 184 (1964). The State, being in privity with the United States and failing to intervene is bound by the determination in *Treasure Salvors I*, 569 F. 2d 330 (1978). Finally, the laudable but dubious interest of the State in archaeology is not determinative of the Eleventh Amendment issues to which this Court granted Certiorari.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR ARREST OF ARTICLES OF SALVAGE FROM ATOCHA MERELY BECAUSE THE STATE ASSERTS A DISPUTED CLAIM OF OWNERSHIP.

A. The Eleventh Amendment Issues Raised by the Proceeding at Bar Do Not Affect the Fisc of the State.

In Eleventh Amendment cases, this Court traditionally has looked closely to see if the relief sought would impact upon the fiscal integrity of the state. This case arose out of an admiralty case seeking to arrest articles of salvage recovered by Treasure Salvors. The State had taken the salvaged articles from Treasure Salvors and State employees had custody of

the articles at the time of the arrest. As the trial court noted, the ancillary process issued in reference to the initial complaint in admiralty and not pursuant to the supplemental complaint for declaratory relief which, although filed, the trial court never acted upon. (App.Pet.Cert. 146-47, 104-10). Whether the suit is an admiralty *in rem, in personam,* or a common law action in mere form, of course, is not determinative of the Eleventh Amendment issue. The *significance* of this action, being the seizure of certain salvaged articles by the Federal Marshal, is that no monetary judgment has been sought nor could be entered against the State.

The Eleventh Amendment issue at bar can be stated with precision:

> Where property in custody of State employees is ordered seized in a maritime *in rem* proceeding by process from the federal district court, does the court, upon the assertion of the Eleventh Amendment by the State, have the power to determine as a jurisdictional fact whether the state is the owner and entitled to possession, and, if not, hold the Eleventh Amendment is no bar?

On the basic question whether mere custody by the State of the articles of salvage precludes, under the Eleventh Amendment, the exercise of jurisdiction by the federal district court, the trial court as a *jurisdictional fact* found that the State was not the owner of the property in question, and the agents and employees of the State had wrongfully taken and withheld possession from Treasure Salvors. (App.Pet.Cert.151,154). Under these circumstances the seizure of the salvaged property (which because of the State's failure to post the supersedeas bond, is not in the actual possession and control of Treasure Salvors, Inc.) is not comparable to proceedings seeking recovery of a monetary judgment for retroactive relief which would have to be obtained from revenue generated by the State as in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032 (1981).

The "shield" of the Eleventh Amendment has also been characterized as a "sword" which the states attempt to use to "forestall suits by individual creditors" or those having rights that operate against the State. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 n. 1 (1959). This "sword" or "shield" can give way when equitable or injunctive relief is sought, *Ex parte Young*, 209 U.S. 123 (1908), or when the monetary relief is prospective, *Milliken v. Bradley*, 433 U.S. 267 (1977), or the costs have an ancillary effect on the state treasury, *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Although the Court cannot control the discretion of a state officer, it can direct the officer to perform some ministerial duty or to refrain from doing an act which he has no legal right to do . *Ex parte Young, 209 U.S. at 158-59.*

Some cases have permitted an award of monetary relief where deprivation of an individual's Fourteenth Amendment rights occurred. *See, e.g., Maher v. Gagne*, 488 U.S. 122, (1980); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 45 (1976). Other cases have spoken of monetary awards simply having an "ancillary effect" on the state treasury and not coming under the Eleventh Amendment protection. *See, e.g., Milliken v. Bradley, supra* (state must pay $6 million to defray costs of school desegration), *Edelman v. Jordan, supra.* The Court in *Edelman* stated:

> [F]iscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.*

415 U.S. at 667-68.

The seizure of articles of salvage in the custody of the State by the United States Marshal and the subsequent determination of ownership by the district court does not affect the fisc of the State.

B. The Eleventh Amendment Does Not Apply To In Rem Actions Where the State is Not the Owner of the Res.

The State contends that the federal court has no power to consider the validity of an Eleventh Amendment objection once the State merely claims to the owner. Brief for Petitioner, p. 18-19. No case by this Court or a court of appeals so holds. The trial court declared that the Eleventh Amendment "is not both a self-proclaimed and self-determined ukase of the State," (App.Pet.Cert. 151). The Fifth Circuit based its affirmance on the view that the federal court had the inherent power to determine the question of its jurisdiction. (App.Pet.Cert. 28-29). Decisions by this Court, addressing not only admiralty and maritime matters, but also other areas where the state has had custody of the property and sought to preclude or avoid any determination of ownership by the rightful claimant reflect the same view. *See, e.g. In re New York (The Queen City),* 256 U.S. 503 (1921) and *United States v. Lee,* 106 U.S. 196 (1882).

Both the district court and the Fifth Circuit expressly recognized the potential application of the Eleventh Amendment to admiralty in rem proceedings *when the state owns the vessel in question and arrest would interfere with a governmental function,* as held by this Court in *In re New York (The Queen City),* 256 U.S. 503 (1921). This Court in *The Queen City* and its companion case *Ex parte New York,* (No. 1) 256 U.S. 490 (1921) had held that the maritime proceedings in question were barred. In *The Queen City* the state attorney general sought prohibition and mandamus on the basis that the vessel in question was immune from arrest as:

> she was the *absolute property* of the State of New York, in its possession and control, and *employed in the public service of the State for governmental uses and purposes,* and, at the times mentioned in the libel, was authorized by law to be employed only for the public and governmental uses and purposes of the State of New York . . . .

256 U.S. at 508 [emphasis added]. In *The Queen City* no special challenge had been made of the state claims of ownership and public use. Indeed the trial court had accepted such allegation as being true, but then held erroneously that the vessel was not immune:

> To the suggestion that the *Queen City* is the property of the State of New York, in its possession and control and employed in its public governmental service, it is objected at the outset that the record and proceedings in the suit in admiralty do not disclose the identity of the owner of the vessel or that she was employed in the governmental service of the State. We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least *in the absence of special challenge.* The suggestion was overruled and denied, with costs, and process thereupon ordered to issue against the vessel, without any intimation that there was doubt about the facts stated in the suggestion, or opportunity given to verify them further. It would be an unwarranted aspersion upon the honor of a great State to treat facts thus solemnly certified by its chief law officer, *and accepted as true when passed upon by the District Court,* as now requiring verification.

256 U.S. at 509 (emphasis added).

Here, the State's ownership *was* contested and the trial court allowed the State an evidentiary hearing after challenge and made jurisdictional fact findings that the State never owned the *Atocha*, its cargo, etc. These findings were affirmed by the Fifth Circuit. (App.Pet.Cert. 29-30). There has been no contention in the courts below that the vessel was in the public service of the State, of course, as it had sunk in 1622, long before we became a nation and long before Florida became a state. The disputed ancillary warrant of arrest issued by the trial court after the court of appeals in *Treasure Salvors I* rejected the *federal* claim of ownership and determined that the wrecked vessel lay on the continental shelf outside the territorial waters of the United States. Because Florida's unsupported claim of ownership was duly challenged, the question of ownership was properly regarded by the Fifth Circuit below as a jurisdictional matter to be judicially resolved upon the evidence. (App.Pet.Cert. 28-29). The resolution of this jurisdictional fact determined the application of the Eleventh Amendment.

The Fifth Circuit interpreted *The Queen City* in the opinion below thusly:

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however we have a *controverted* claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.
>
> Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the

> res in dispute. Instead, the Court must make a jurisdictional determination . . . .

(App.Pet.Cert.27-28).

The Fifth Circuit stated in its footnote to the quoted text:

> This approach is especially desirable in admiralty in rem actions. Federals courts have exclusive jurisdiction over admiralty in rem proceedings. *Madruga v. Superior Court of California,* 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty 1-13 (2d ed.1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim. (App.Pet.Cert. 29, n.19).

This Court has recognized in analogous maritime cases that a claim of sovereign immunity asserted by a foreign government against arrest of a vessel, if challenged, will allow the district court to make appropriate jurisdictional findings as to the ownership of the vessel. In *The Navemar,* 303 U.S. 68 (1938), this Court considered whether a claim of immunity from arrest of a vessel by the Republic of Spain was a proper issue for the court to resolve. The Court of Appeals for the Second Circuit accepted Spain's suggestion of sovereign immunity as conclusive, but this Court reversed saying:

> This, we think was a mistaken view of the force and effect of the suggestion. Admittedly a public vessel . . . is immune from suit in the courts of admiralty of the United States . . . But [the district court] *was not bound,* as the Court of Appeals thought, *to accept* the allegations of *the suggestion as conclusive* . . . .
>
> But *the filed suggestion,* though sufficient as a statement of the contentions made, *was not proof of its allegations.* This Court has explicitly declined to give such a suggestion the force of proof . . . .

303 U.S. 68, 74-75 (citing *In re Muir* 254 U.S. 522 (1920). In *In re Muir* the Court said:

> [I]t is apparent that the status of the Gleneden [the ship alleged to be in British service] . . is at best doubtful and uncertain, both as a matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, *for it turns on the status of the vessel* . . . . The Court may take up again the question of its jurisdiction.

254 U.S. 522, 533 (1920) (emphasis added).

The sole situation in which an assertion of ownership by a foreign sovereign is considered conclusive is where the Executive Department of the United States government *officially* recognizes the foreign state's claim to sovereign immunity as the owner in possession and service. *The Navemar,* 303 U.S. at 74. This exception is inapplicable as we have no diplomatic matter involving the conduct of foreign affairs; moreover, the United States itself in the earlier case, *Treasure Salvors I,* 569 F.2d 330 (5th Cir. 1978) unsuccessfully claimed to be the owner of the articles of salvage from the *Atocha.* The claim of the United States was a repudiation of and in direct conflict with the claim of the State.

In *Republic of Mexico v. Hoffman, (The Baja California),* 324 U.S. 30 (1945), the Republic of Mexico filed a suggestion of ownership to a privately operated ship claiming sovereign immunity from an in rem action in admiralty. The district court denied the claim of immunity and proceeded with a trial on the merits, finding the ship in the possession and control of a private company which had contracted with the Mexican government to operate the ship. On certiorari, this Court upheld the trial court's action, ruling that "the courts may decide for themselves whether all the requisites of immunity exist." *Id.* at 34-35.

While differences may exist between the Eleventh Amendment and the sovereign immunity of a foreign state, the principle calling for judicial determination of the

jurisdictional fact of state or sovereign ownership and service would be the same. Further, we have an express ruling by this Court rejecting the State's claim of title to the submerged lands in the area wherein the wreck was determined to be located by the trial court. *United States v. Florida,* 420 U.S. 531 (1975).

In an *in rem* proceeding against a vessel or articles of salvage, the court issues a warrant of arrest *in rem* and the *res* is then placed under control or otherwise constructively secured by the United States Marshal. We submit, the rule to be: *if the vessel or property is owned* and in the service of the state or sovereign, the litigation to enforce the maritime lien, for salvage service or otherwise, will be considered a suit against the state or sovereign; *if not owned by the state,* the litigation of finder's title or maritime lien does not constitute a suit against the state. Thus, the ownership of the *res* becomes a jurisdictional fact. In this case against articles of salvage, no judgment has been sought against the State of Florida; the suit will not raid the State's treasury.

In 1882, the validity of an asserted claim by the United States and its ability to divest the court of jurisdiction was at issue. The United States claimed ownership of property and insisted that the mere *claim* by the sovereign forbade any inquiry into the claim. The Court responded in an eloquent opinion in *United States v. Lee,* 106 U.S. 196 (1882):

> Under our system the people . . . are the sovereign. Their rights . . . are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person . . . to whom he need yield the rights which the law secures to him . . . *when he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States should prevent him from using the means which the law gives him for the protection and enforcement of that right.*

Id. ad 208-09 (emphasis added).

> The position assumed here, [by the government] is that, however clear his rights, no remedy can be afforded to him when . . . his opponent is an officer of the United States [or officer of the State of Florida?], claiming to act under its authority . . . The objection . . . forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it . . .
>
> But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? *Id* at 219.
>
> * * *
>
> The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government . . . will be seen to be small indeed compared to [the evil of the government using an absolute veto to deprive a person of property after a judgment by a court that the individual has a right to possession of the property.]. *Id.* at 221.

Nearly 100 years later Justice Stevens, concurring in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 101 S. Ct. 1032,1036 (1981) stated:

> Citizens must have confidence that the rules on which they rely in ordering their affairs—particularly when they are prepared to take issue with those in power in doing so—are rules of law and not merely the opinions of a small group of men who temporarily occupy high [state?] office. It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.

The State can not use the "shield" of the Eleventh Amendment as a "sword" to violate due process. To deprive the court of the power to decide the jurisdictional facts of state

immunity under the Eleventh Amendment or the doctrine of sovereign immunity would be in violation of due process. Not only did the trial court hold the purported salvage contracts to be invalid on five different grounds, including coercion, but the trial court also found that the agents of the State of Florida had wrongfully taken possession of the articles of salvage in violation of due process under Florida and Federal law. (App.Pet.Cert. 123-22, 150, 154). This Court in *United States v. Lee,* and the Florida Supreme Court recognize this as a ground for removing the cloak of immunity from the wrongdoer.

In *State Road Department of Florida v. Tharp,* 1 So. 2d 868, 869-70 (Fla. 1941), the Florida Supreme Court rejected the State's claim of immunity, announcing that:

> To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of nonsuability of the State is too anomalous and out of step with the spirit and letter of law to claim protection under the Constitution . . . If a State agency can deliberatlely trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the Constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding . . . would reverse the order of democracy in this country and lead it into a blind alley.

The courts below recognized their judicial duty to resolve the disputed jurisdictional fact of ownership in considering the State's plea of the Eleventh Amendment. For this reason the judgment should be affirmed.

II. FLORIDA HAS WAIVED ELEVENTH AMENDMENT PROTECTION BY STATUTE AND BY VOLUNTARY

PARTICIPATION IN AN AREA OF FEDERAL PREEMINENCE.

A. The State of Florida Has Waived Its Eleventh Amendment Protection by Express Statutory Consent to Suit in Federal Court.

The Florida Constitution, art.10 §13, allows for "general law for bringing suit against the state as to all liabilities . . . hereafter originating." The statute regarding liens and claims in personal property authorizes suit in either state or federal court:

> The state may be [sued] in . . . any district court of the United States, having jurisdiction of the subject matter . . . for the foreclosure of a . . . lien on . . . personal property on which the state . . . claims a . . . lien.

Section 69.041 (1) (b), Florida Statutes (1979).

The State's claim to the salvage from the *Atocha* was predicated on a statute asserting ownership to all sunken ships lying on "sovereignty submerged lands." Because Florida claims ownership to salvage recovered outside its boundaries, any interest claimed by the State under the alleged salvage contracts is a salvage lien under §69.041 (1)(b) Florida Statutes. (App.Pet.Cert. 155-56).

Admiralty gives a salvor a "lien" on the salvage. The lien is *not* a debt owed, but a *property interest* in the salvage. Further, salvors taking possession of abandoned derelicts have not only a lien, but absolute possession and control which vests by operation of law, *Wiggins v. 1100 Tons, More or Less, of Italian Marble,* 186 F.Supp. 452, 456 (E.D.Va. 1960), and *no one can interfere with them* except in cases of manifest incompetence. *Rickard v. Pringle,* 293 F. Supp. 981, 985 (E.D.N.Y. 1968); *Broere v. Two Thousand One Hundred Thirty-Three Dollars,* 72 F. Supp. 115 (E.D.N.Y.) 1947).

Under §69.041 (1) (b), Florida Statutes, the State has waived immunity from suit in federal court to resolve

conflicting salvage liens involving claims or ownership or interest in the salvaged property. Neither the statute nor the case law construing it restricts the nature of the statutorily required lien.

The State cites *Seaside Properties, Inc. v. State Road Department,* 121 So. 2d 204 (Fla. Dist. Ct. App. 1960) as holding that §69.041, Fla. Sta., is a "lien statute only." Brief for Petitioner, p.43, but neglects to mention that *Seaside Properties* construes the waiver as available when the state *commits acts amounting to a taking of property without compensation therefor. Seaside Properties,* 121 So.2d at 205. This principle and that of the Florida Supreme Court's decision in *State Road Department of Florida v. Tharp,* 1 So.2d 868 (Fla.1941), would be applicable whether the property that is wrongfully taken is real or personal and even if conflicting maritime liens were not involved. The trial court below determined that "the agents for the [State] wrongfully, and in violation of basic due process rights under federal and Florida law, deprived Treasure Salvors of its property." (App.Pet.Cert. 154).

Although this Court requires a clear waiver of the Eleventh Amendment, *Edelman v. Jordan,* 415 U.S. 671 (1974); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032 (1981), whether the State has waived the Amendment is in itself a federal question of which this Court is the ultimate arbitrator. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959). Under the circumstances present in this case, Florida Statute §69.041 (1) (b) constitutes a waiver of the Eleventh Amendment.

B. The State of Florida Waived its Eleventh Amendment Protection by Participation in an Area of Traditional and Paramount Federal Regulation.

The Constitution of the United States outlines the supremacy of the federal government in specified areas, and the authority of Congress to act pursuant to the Constitution

without interference by the states has been stated in numerous decisions. *See,e.g. Maryland v. Louisiana,* 101 S. Ct. 2114 (1981); *Maher v. Gagne,* 488 U.S. 122 (1980); *Parden v. Terminal Railway,* 377 U.S. 184 (1964). Once a state "leaves the sphere that is exclusively its own and enters into the activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Pardon,* 377 U.S. at 196.

Resolving jurisdictional challenges based on Eleventh Amendment immunity, a court must scrutinize the underlying activity to determine if it falls within the field of state activities within Eleventh Amendment protection. A state engaging in traditional state police power activity may legitimately assert the Eleventh Amendment to protect itself from improper claims *e.g., Edelman v. Jordan,* 415 U.S. 651 (1974), but a state participating in areas of traditional and paramount federal rgulation cannot assert the Eleventh Amendment as a shield to insulate its noncompliance with the federal law. *Parden v. Terminal Railway,* 377 U.S. 184 (1964). The federal courts having jurisdiction over the subject matter of admiralty cases have no right to decline to exercise that jurisdiction. *See, Ex parte Young,* 209 U.S. 123, 143, 160 (1980); *see also, Standard Oil Co. v. United States,* 25 F.2d 480, 483 (S.D.Ala.1928).

Though the Eleventh Amendment applies to bar a suit, the Court limits the effect to insulate a state's fiscal integrity. The *Edelman* Court determined that while the state was immune from suit to obtain *retroactive* welfare benefits, no such immunity existed in suits to enforce existing prospective rights to benefits. *Edelman,* 415 U.S. at 673-74. Though the welfare and care of its citizens is a traditional state concern, the state's voluntary choice to participate in a federal program incorporated into that decision the waiver of sovereign immunity with reference to the rights of its citizens in the particular program joined.

In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032

(1981), a divided Court upheld the narrow *Edelman* construction of the Eleventh Amendment as banning suits to collect retroactive welfare benefits pursuant to federally sponsored programs. That analysis follows logically from the *Pardon* rule that a state, voluntarily engaging in an activity of traditional paramount federal control (operation of a railroad in interstate commerce), voluntarily subjects itself to the jurisdiction of the federal courts. *Parden*, 377 U.S. at 193-94.

In *Parden*, a personal injury suit was brought under the F.E.L.A., 45 U.S.C. §51-60, against the Alabama Docks Terminal Railway, a state agency. The state contended that the Eleventh Amendment barred suit. The Court held that the states, by constitutionally empowering Congress to regulate commerce, relinquished any sovereign rights they had in that area and had no immunity. *Parden*, 377 U.S. at 192.

> Congress is not attempting to extend its regulatory power to objects that would not otherwise be subject to it, but rather *to prevent objects otherwise subject to the power from being unjustifiably excepted.*

Parden, 377 at 194, n. 11 (emphasis added); *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 288-289 (1973) (Marshall, J. concurring).

Chesapeake Bay Bridge & Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), concerned the rights of the states when Congress regulates under its Commerce Clause power. The State of Virginia received a permit from the United States to construct a bridge-tunnel across the Chesapeake Bay. A light tower collapsed into the Bay and a vessel was damaged by the obstruction. The Fourth Circuit held the state had relinquished its sovereign immunity by obtaining the federal permit to build the bridge across a navigable waterway. This was an "exclusive Federal realm — interstate and foreign commerce," and the state was subservient to the paramount federal control. *Id.* at 1003.

Where the federal government has constitutionally pre-empted state action, or where a state law conflicts with the uniformity of the federal law, then the state may not act and

consequently claim sovereign immunity. *See, Askew v. American Waterways Operations,* 411 U.S. 325, 337 (1973); *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267 (1935).

The admiralty and maritime proceeding was within the exclusive subject matter jurisdiction of the federal district court pursuant to 28 U.S.C. §1333, as authorized by article III, §2 of the Constitution. Specifically, Congress in addition to general maritime law regarding salvage, provided in the Salvage Act of 1912 the following reference to wrecks off the State of Florida:

> All property, of any description whatsover, which shall be taken from any wreck, from the sea, or from any of the keys and shoals, within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

42 U.S. C. §722.

The Salvage Act was a legislative implementation by the United States of the *Convention on Certain Rules Relating to Assistance and Salvage at Sea.* Signed 1910, entered in force by the U.S. 1913. 37 Stat. 1658; T.S. 576. This treaty also became the law of the land and provides that in salvage disputes between two nationals,the law of the "nation" will be applied.

The Supremacy Clause of the Constitution also preempts state action within a given area. In *Maryland v. Louisiana,* 101 S. Ct. 2114 (1981), this Court held a Louisiana tax on the "first-use of any natural gas brought into Louisiana," unconstitutional under the Supremacy Clause, art. VI, cl. 2, and the commerce clause, art. I, §8, cl. 3. *Id.* at 2132, n. 26.

If the state attempts statutory regulation in an area of federal supremacy, any conflict voids the state statute if compliance with both statutes is impossible or the state statute is an "obstacle" to effectuation of the Congressional objective. *Id.*

Florida's intrusion into the federal realm of admiralty, by claiming authority over salvage operations inside and outside its terrritorial waters under Chapter 267, Florida Statutes, is an "obstacle" to the federal objectives of consistency and uniformity in salvage regulation under the general maritime law, the Salvage Act and the Salvage Treaty. The trial court held that "Chapter 267 . . . cannot be used to alter or prejudice the rights of a finder or salvager under applicable maritime." (App.Pet.Cert.135). This Court has observed that there is a need for symmetry and harmony in admiralty and that the uniform operation of admiralty principles is basic to the government's control over maritime activities. *Ex parte New York,* 256 U.S. 490, 502-3 (1921); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).

The State suggests that it can disrupt and *foreclose* the federal govenment's control over maritime activities. The ability to claim ownership of salvage brought up by a Florida corporation inside or outside Florida territorial waters, and to concurrently preclude admiralty court adjudication of rights of salvage and possession, conflicts with the uniform national regulation of maritime activities intended by article III, §2, of the United States Constitution, *Southern Pacific Co. v. Jensen, supra.*

The State admits its entry into this admiralty suit was in part prompted by its interest in protecting its status as *"a center of maritime commercial activity," Brief for Petitioner, p. 31, then asserts that, since the suit will affect claimed property rights of the State in maritime salvage, only* a state court may litigate the State's claim.

In addition to waiver based upon participation in federal governmental programs where the relief was prospective, this Court has held that asserting a claim in federal court will constitute a waiver. In the evidentiary hearing before the district court, the State of Florida objected to the court's jurisdiction, plead the Eleventh Amendment and asserted an affirmative claim on the merits to the *res* subject to the ancillary arrest warrant. The trial court noted the State's

affirmative claim would be a waiver under the Eleventh Amendment as to the merits of the State's claim. The district court relied upon the Supreme Court's decision in *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947) stating:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudiciation of interests claimed in a *res*. It is nonetheless such because the claim is rejected into to, reduced in part, given a priority inferior to that claimed or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim . . . . . (App.Pet.Cert.144).

Waiver in suits in admiralty is a federal, not state, question. "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority, but within a sphere . . . subject to the power of the federal government, the question of whether the State's act constitutes the alleged consent is one of federal law." *Parden*, 377 U.S. at 196. This Court must never allow a state to construct a legal framework where the state voluntarily enters a federally regulated activity, but concurrently forecloses suit against itself by asserting the Eleventh Amendment sovereign immunity. *Id.*

Here, the State has entered the traditional maritime activity of salvage, a subject of *exclusive* federal jurisdiction. In so doing, the State, as did Alabama in *Parden*, voluntarily submitted itself to the jurisdiction of the federal court.

The State act in reality abolishes the traditional martime remedy of a "pure salvage" award and attempts to substitute therefor a state regulated system of contract salvage. There is no significant distinction between a pure salvage award and a contractual salvage award insofar as jurisdiction is concerned. Federal admiralty courts review both. Both contract salvage and pure salvage generage salvage liens. The salvage contact entered into by appellant and appellee "i.e. no cure, no pay" provides a matter over which the courts of admiralty have *always* asserted their salvage jurisdiction.

The facts show that the trial and appellate courts correctly held that there was a maritime lien, the salvage contract involved a maritime activity and lien claim cognizable only in admiralty, and the trial court had jurisdiction to determine the validity of the ownership claim by the State which formed the statutory basis of the contract.

The Amici plead in their brief that:

> The underlying dispute over the construction of the contract is purely and simply a local questin, quite separate from any admiralty considerations. Amici bried at 18.

The salvage of maritime objects in international waters on the outer continental shelf is *not* local. State legislation may not intrude into an exclusive maritime area nor change the uniform application of a statute or the general maritime law. *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).

In the case at bar, not only is there no other adequate forum to protect Treasurer Salvors' interest in the articles of salvage, but here is no state court remedy at all. Recently, the State of Florida's Third District Court of Appeal upheld the dismissal by a state trial court of a salvage action even though the action was brought *in personam* rather than *in rem.* The State appellate court, as a matter of state law, held that:

> Salvage being a matter particularly within the jurisdiction of the admiralty courts because, inter alia, of

> the particular system of awarding the compensation, we hold that the trial court correctly dismissed the instant salvage action.

O'Neill v. Schoenbrod, 355 So.2d 400 (Fla. Dist. Ct. App. 1978).The plaintiff then restyled his action and refiled it alleging "unjust enrichment." The trial court and the appellate court dismissed this second try at "disguising a salvage claim," ruling that state court litigation was preempted and would serve only to "create confusion and unnecessary state-federal jurisdiction conflict." *O'Neill v. Schoebrod,* 374 So. 2d 70-71 (Fla.Dist.Ct.App. 1979); *See also, Sturgis v. Law & St. John,* 5 Barb. 451 (N.Y. App.Div. 1850). This view is in accord with the historic treatment of salvage cases:

> Cases of salvage were not tried in American common-law courts before the establishment of the Republic of the United States of America. Therefore, the savings to suitors clause of the Act of September 24, 1789 . . . does not apply to salvage suits. It does not give the common-law courts jurisdiction over a class of cases which it never possessed.

M. Norris, *Law of Salvage,* Note 3, §14 at 18.

As between Treasure Salvors and the State of Florida, litigation regarding a maritime salvage contract which involves title to objects of salvage from a wreck outside the territorial limits of the United States, is a question of salvage. The answer to the State and the Amici's pleading is simple, what other court, but a court of admiratly, has jurisdiction to try a question of salvage? *Housman v. The Schooner North Carolina,* 40 U.S. (15 Pet.) 40, 48 (1841).

III. *THE COURTS BELOW CORRECTLY INTERPRETED UNITED STATES V. FLORIDA WHEN THEY FOUND THAT THE WRECK SITE OF THE ATOCHA IS NOT LOCATED ON SOVEREIGNTY SUBMERGED LANDS.*

For the first time, the State argues that the courts below "misinterpreted" this Court's decision in *United States v. Florida*, 420 U.S. 531 (1975), because that decision "established the State's boundaries for purposes of the Submerged Lands Act only." Brief for Petitioner, p. 75. The State did not raise this as a Question Presented in the Petition for Writ of Certiorari. Below, the State argued that *United States v. Florida* could not be applied retroactively:

> If *United States v. Florida* applies at all, that decision would have the effect of redefining the boundaries of Florida after the contracts were executed. This raises the question, when a federal court construes a federal statute will the court's decision be applied retroactively when to do so will effect contract or property rights?

(Florida's Fifth Circuit Brief pp. 46-47, No. 78-2950.) Florida has abandoned its retroactive argument. The federal Submerged Lands Act was passed in 1953, 14 years before Chapter 267, and 18 years before the salvage of the *Atocha* and the void salvage contracts.

The State admits that the Special Master's Report in *United States v. Florida* placed the *Atocha* outside the State's boundaries, as established for purposes of the Submerged Lands Act, but claims the State's historical and constitutional boundaries gave Florida the right to control the salvage operations of the *Atocha*. Brief for Petitioner, pp 77-92. This argument ignores three crucial facts: (1) Chapter 267, Florida Statutes (1979), by its express terms, requires that the location of the wreck site be on "state-owned sovereignty submerged lands"; (2) before the Submerged Lands Act was passed the State had *no* title to lands within the three-mile limit or on the continental shelf, *United States v. California*, 332 U.S. 19, 31 (1947); and (3) this Court decided in *United States v. Florida*, that the State is *not* the sovereign over the submerged land on which the *Atocha* is located. The district court and Fifth Circuit recognized these facts and properly rejected the State's title claim to the wreck site of the *Atocha*.

The State's title claim depends upon "sovereignty" ownership of the seabed where the *Atocha* lies as § 267.061 (1) (b) of the Florida Statutes *expressly* limited the Division of Archives' scope of authority to "state-owned sovereignty submerged lands." The contracts follow this limitation on state authority:

> The Division hereby grants unto the salvager a contract to conduct underwater salvage *from and upon certain submerged sovereignty lands of and belonging to the State of Florida.*

(J.A. 20-21). Irrespective of historical or constitutional boundaries which the State attempts to advance before this Court, the State, under its laws and contract, must be the sovereign over the submerged land in question before it has a title claim to the *Atocha* or *authority to contract for salvage* or before the contract applies to the salvage here in suit.

Accordingly, this case differs from the situation addressed in *Skiriotes v. Florida*, 313 U.S. 69 (1941). *Skiriotes* involved a state criminal prosecution for violation of the statute prohibiting the use of diving suits while fishing in water within the territorial limits of the State of Florida. 313 U.S. at 70. This Court's statement that the "State of Florida may . . . govern matters in which the State has a legitimate interest *and where there is no conflict with acts of Congress*" was *dicta* based upon the police power of a state and is not relevant to the language of the instant statute. 313 U.S. at 77 (emphasis added).

Here, Florida has no statute purporting to give the State a right to claim title to wrecks—found beyond "state-owned sovereignty submerged lands." Whether Florida could exercise control over its citizens for salvage operations on the high seas is not an issue under Chapter 267, Florida Statutes, or any other enacted law of Florida. See *Treasure Salvors, I*, 569 F.2d at 343, discussing rights of the United States in such respect.

The lower courts in rejecting Florida's claim to the salvage focused on this Court's decision in *United States v. Florida, supra*, defining the submerged lands over which Florida could assert a sovereign claim. The district court and the Fifth Circuit correctly recognized that the wreck site is not now, and never was, located on state-owned sovereignty submerged lands. The district court stated the *Atocha* was:

> located outside the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1)(b), Florida Statutes, which purports to vest title in the State does not apply since the property was not on "sovereignty lands of the State." The Division of Archives has no right nor interest in such property other than what might exist under an *ultra vires* contract between the Division and Treasure Salvors. Contrary to the Division of Archives' argument, the Supreme Court in *United States v. Florida*, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed. 2d 375 (1975), did not modify nor change the State of Florida's seaward boundary but merely defined it as it was and is.

(App. Pet. Cert. 117-18). The Fifth Circuit likewise found "the Supreme Court, in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed. 2d 375 (1975), held that the part of the continental shelf on which the *Atocha* was resting had *never* been owned by Florida." (App. Pet. Cert. 44-45).

The Special Master's Report this Court adopted in *United States v. Florida* supports the decision of the lower courts. The Special Master concluded that *United States v. California* 332 U.S. 19 (1947),[1] *United States v. Louisiana*, 339 U.S. 699

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[1]Here, this Court refused to extend the *Pollard* rule of ownership as an incident of state sovereignty in *relation to inland waters out into the soil beneath the ocean.* As this Court stated, "the belief that local interests are so predominant as constitutionally to require state dominion

(1950)[2], and *United States v. Texas*, 339 U.S. 707 (1950)[3] clearly established that "the State of Florida, prior to May 22, 1953, did not have title or ownership of the seabed . . . seaward from its coastline in either the Atlantic Ocean or the Gulf of Mexico." Further, the Special Master found the *only* seabed which Florida has acquired since its readmission to the Union in 1869 is the three-mile belt resulting from the 1953 Congressional grant under the Submerged Lands Act § 2(b), 67 Stat. 29, 43 U.S.C. §1301(b)[4] which "*in no event* extend[ed] from the coastline of the state more than three geographical miles into the Atlantic . . . " Special Master's Report, Conclusion 2.

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over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over *any part of the ocean or the ocean's bottom.*" 332 U.S. at 34 (emphasis added).

[2]In this case, Louisiana claimed sovereign rights twenty-four miles seaward of the three-mile belt defined in *United States v. California.* This Court rejected Louisiana's claim and held, "if, as we held in California's case, the three-mile belt is in the domain of the nation rather than that of the separate states, it follows *a fortiori* that the ocean beyond that limit also is." 339 U.S. at 705.

[3]Where this Court prophetically stated, "Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. *If the property whatever it may be,* lies seaward of lower water mark, its use, disposition, management and control involve national interests and national responsibilities . . ." 339 U.S. at 719 (emphasis added).

[4]In defining the effect of the Submerged Lands Act, this Court noted in *United States v. Maine,* 420 U.S. 515 (1975), that "the grant to the states is *expressly limited to the seabed within three miles* (or three marine leagues in some cases) *of the coastline, whether or not the State's historic boundaries might extend farther into the ocean.*" 420 U.S. at 526 (emphasis added).

Likewise, in *United States v. Texas, supra*, the State sought to extend its sovereignty over the seabed off its Gulf coastline by legislatively defining its boundaries. In rejecting these legislative acts, this Court noted,

> Texas in 1941 sought to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit *and asserted ownership of the bed within that area.* And in 1947 she put the extended boundary to the outer edge of the continental shelf. *The irrelevancy of these acts* to the issue before us has been adequately demonstrated in *United States v. Louisiana.*

339 U.S. at 720 (emphasis added)(footnotes omitted). Florida argues correctly, we believe, that articles of salvage are not natural resources. Brief for Petitioner, pp. 102-103. This gives the State no extra-territorial right to ownership of wrecked vessels on the continental shelf but suggests the State's title to natural resources under the Submerged Lands Act does not include ship wrecks and salvage. 15 San Diego L. Rev. 623 at 642-3. Jurisdiction of these matters within the territorial boundaries is controlled by the federal government since Congress reserved the navigational and maritime servitude. 43 U.S.C. §1314. In *Treasure Salvors I*, 569 F.2d 330, 338-40 (1978), the Fifth Circuit held that the United States did not have a claim of ownership to salvage recovered outside the three-mile boundary as defined in *United States v. Florida.*

The only proper sovereign claim which the State has off the Florida coast is to the natural resources of the submerged lands included in the 1953 limited congressional grant as defined by this Court in *United States v. Florida.* No other congressional grants of submerged lands exist and in the

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See also Note, 15 San Diego L. Rev. 623, 642, 643 (1978): "In *Treasure Salvors, Inc.*, the Court concluded that the [Submerged Lands Act] and the OCSLA granted jurisdiction over only minerals of the seabed and not sunken vessels." (emphasis added).

absence of such a grant, Florida cannot claim sovereign rights over submerged lands outside the three-mile belt expressly granted by Congress. Whether Florida can regulate its citizens outside this boundary is not the issue in this case and is irrelevant to the *factual* determination of where Congress—and this Court—have drawn the submerged lands boundary of Florida. The *Atocha* is not on state-owned sovereignty submerged lands, hence the State cannot claim title to the salvage on such basis. The lower courts correctly interpreted *United States v. Florida.*

IV. TREASURE SALVORS I, VESTING TITLE TO THE ATOCHA SALVAGE IN PLAINTIFFS, BINDS THE STATE SINCE IT WAS IN PRIVITY WITH THE UNITED STATES AND FAILED TO INTERVENE.

The trial court held the State bound by the determination of ownership of the *Atocha* and salvage therefrom made in the earlier claim by the United States in *Treasure Salvors I,* 569 F.2d 330 (5th Cir. 1978). (App. Pet. Cert. 70-104). On appeal in this proceeding, the Fifth Circuit affirmed on the alternative holding that the suit was not barred by the Eleventh Amendment and expressly declined passing on whether the State was bound:

> This Court declines to either affirm or reverse the trial judge's innovative res judicata analysis. The preclusion issues raised by the district court's opinion are reserved for another day.

(App. Pet. Cert. 23, n. 17).

Previously in *Treasure Salvors I,* the Fifth Circuit had modified the trial court's judgment that Treasure Salvors had title against the world to those who were parties and privies to the litigation. 569 F.2d at 335-36. Pursuant to the mandate in *Treasure Salvors I,* the trial court then ruled in the present hearings that the State was bound under the terms of the mandate as it was in privity and had failed to intervene. (App. Pet. Cert. 70-104).

The failure of the State to intervene is a valid basis to affirm the result below, particularly as it would obviate the Eleventh Amendment arguments made by Florida. The United States' claim to articles of salvage from the *Atocha* included those articles in possession of the State. As the District Judge remarked, if the United States had won, it would have received title to the *res.* (R.v. IV 22-23). If the State had intervened, *claiming against the United States*, it would have had no basis to assert an Eleventh Amendment defense. Thus under these circumstances, holding the State bound for failure to intervene is not depriving the State of an Eleventh Amendment objection that it otherwise would have had. *cf. Montana v. United States*, 440 U.S. 147 (1979) holding the United States to have been in privity with a private party and collaterally estopped by the earlier litigation.

The trial court's ruling was based on findings of fact that: 1) the Division and Treasure Salvors were disputing the terms of their contract governing disposition of the artifacts *before* Treasure Salvors and the United States began their litigation over ownership of *all* the treasure—including that held by the Division of Archives; 2) the Division of Archives did not intervene, even though it had an absolute right to do so; 3) the Division of Archives knew of and participated in that suit; 4) the Division of Archives knew that the suit was an *in rem* proceeding brought to settle, for all the world, the ownership rights to the treasure; 5) the Division of Archives assisted the United States in its litigation against Treasure Salvors; 6) the Division of Archives relied on the United States to protect its interests, which were in repudiation of its fiduciary duties under the purported salvage agreements with Treasure Salvors; 7) prior to and during the suit, the Division of Archives negotiated with the United States to obtain an antiquities permit for the wreck site; 8) an attorney from the Division of Archives assisted the federal government in its litigation; 9) the Division of Archives negotiated with the United States regarding division and disposition of the

treasure, on the assumption that the United States would prevail. (App. Pet. Cert. 74-104).*

Meenan, in "*Marine Antiquities Preservation*," 15 San Diego Law Rev. 623, 640-41, n. 86 (1978), quotes from an interview with Michael W. Reed, Attorney, United States Department of Justice, Attorney for the United States in *Treasure Salvors I*, 569 F.2d 330, and reveals that not only did the State of Florida participate in the federal government's case, but *specifically requested* that the Department of Justice "intervene to protect" the State's claim to the articles of salvage "*now determined to lie on the outer continental shelf.*" *Id.* at n. 86, 641.

The trial court's memorandum order stated:

> If the Division of Archives is in privity there is no question that it would be bound by the judgment and its argument against jurisdiction would be of no avail.

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*The Division knew of the pendency of the suit and what the suit was about. R.v. IV 13-27. Inquiring about the State's involvement with the Federal Government, the court below asked the Director of the Division: "You had talked to the Federal Government people. You had decided among yourselves that the Federal Government people would bring the lawsuit claiming the whole title to the whole thing, and as a result of it, you would—your Department would receive a certain percentage of whatever artifacts were recovered. Isn't that true?" The Director admitted their involvement. R.v. IV 20. The record also clearly reflects that the Director was attempting to be evasive. The Court rephrased the inquiry in order to get a clearer response: "What he is talking about is your knowing of the pendency of the suit and generally the subject matter that the suit was about." R.v. IV 20. The Director then answered: "Yes, sir, no question about that." R.v.IV 20.

> . . . The record reflects an involvement by the Division of Archives with the United States, together with a bypassing of an opportunity to intervene, which warrants a holding that the Division is and should be bound.

(R.v. II 481-2).

The trial court made extensive findings on the issue of privity and failure to intervene. (App. Pet. Cert. 70-104, 117-142). Florida in its brief to the Fifth Circuit did not specifically challenge any of the facts found to be clearly erroneous or raise the matter as an "Issues Presented" in its brief. Under these circumstances, this Court may affirm on the basis of the trial court's findings that the State is bound by the judgment in *Treasure Salvors I.*

All of the reasons given by this Court in its decisions extending issue preclusion to non-parties are also present here. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Montana v. United States*, 440 U.S. 147 (1979). The State should not be allowed to litigate by proxy and both avoid res judicata and waiver of immunity.

V. THE PUBLIC INTEREST IS BETTER SERVED BY TREASURE SALVORS OBTAINING POSSESSION.

The archaeological interest professed by the State to these objects of salvage is inapplicable to Eleventh Amendment immunity, however, because of the extensive references to this issue by the State, a brief response is warranted. A compelling misconception, because one would want to believe it, is that a state bureaucratic agency is more dedicated and better qualified to develop, display and disseminate the data originating from the salvage of marine "artifacts" than are treasure hunters. Indeed, the State insinuates that it is protecting "Florida" artifacts and is placing them on display for its citizens. The proof reveals quite a different picture. The State did not aid in the archival research, location, discovery or salvage of the *Atocha.* (R.v.

IV 105-6). The State has been a poor curator, losing 573 items including a valuable emerald, (R.v. V 25). Many of the coins retained by the State were still uncleaned five years after the State took them. (R.v. V 26). The State attempted to keep without division some of the latest salvaged articles and other precious items. (R.v. V 48-9). The State's Archaeological work was minimal. (R.v. V 25). When the 9 bronze cannons were found, an amazing discovery which conclusively identified the wreck as the *Atocha*, the State tried to deny the importance of the find. (R.v. V 13.)

Treasure Salvors brought outstanding experts from all over the world to aid in verifying the finds, (R.v. V 19, 20), while the State has never acknowledged the wreck to be the *Atocha* (R.v. IV 103), and has accused Treasure Salvors of bringing the cannons from another site. (R.v. IV 104). All of the archival research, which provided conclusive identification of the wreck, was done by Treasure Salvors, (R.v. V 105), which kept meticulous records, photographing each item, logging it in. (R.v. V 46, 47, 48; R.v. IV 197, 198). Common sense and experience tell any salvor that unless adequate records are maintained and provenience preserved, the value of salvage is dramatically reduced.

Contrast the State's meagre display of 6 to 9 items out of the tens of thousands the State held for five years, (R.v.V 100) with Treasure Salvors sponsoring numerous publications to a broad demographic market. *e.g., Free Enterprise Magazine, Reader's Digest, Time, Newsweek, Oceans, N.Y. Times, Playboy, National Geographic,* a book by Robert Daily entitled *Treasure*; Burgess, *They Found Treasure;* and sponsoring exhibits: February 1976, Cape Coral, Florida; June—September 1976, National Geographic, Washington, D.C. February 1977; Atlanta Peach Tree Plaza; April 1977 Museum of Art and History, Cincinnati, Ohio; 1978 Ocean Society of Australia, New Zealand. (R.v. IV 188-190; R.v. V 10-12, 21-22).

Treasure Salvors explored 320,000 linear miles of ocean in its search, (R.v. IV 183), at an expenditure of $5,000,000 and

the loss of four lives, including that of the oldest son of its president Mel Fisher, (R.v. IV 187, 188), and they never lost a coin. R.v. IV 194. Eighteen thousand Spanish documents relating to the *Atocha* and its sister ship were collected, including the manifest of the *Atocha* on the fatal voyage. (R.v.IV 196, 197, 198). The State has only obstructed the archaeological salvage, removing all identifying marks from three-fourths of the items turned over to Treasure Salvors at division [over the protest of Treasure Salvors] (R.v. V 24, 40), requiring Treasure Salvors to use their own museum curator and other personnel to restore the provenience data. (R.v. V 24). Treasure Salvors had set up an accurate underwater grid system and a corridor of spar buoys, and by this means the provenience of every item was provided by Treasure Salvors, but destroyed by the State upon division. (R.v. V 40).

For a complete historical account of the search, the careful attention to the preservation of data, see Lyon, *The Search for the Atocha*, (Harper & Rowe 1979) where the work of Duncan Matthewson, archaeologist for Treasure Salvors is extolled, *Id.* 225. "His work was studded with detail; he had meticulously examined the site and the artifacts that had come from it." His thesis insured, "That, whatever happened to the salvors efforts, the basic facts about the ship, with which we had all come to identify ourselves so closely, would be recorded." The problems and techniques of shallow ship wreck archaeology with particular reference to the *Atocha* are set out in Duncan's thesis, Exhibit 1 to the hearing on the Supersedeas Bond. (R.v. V 48-49).

The National Geographic Society produced an hour long documentary bringing to life the loss of the *Atocha* and the struggles, trials and tribulations of Treasure Salvors in locating and salvaging her. The film uses no actors and depicts accurately the events portrayed. (R.v. IV 57, 233. Treasure Salvors Exhibit 10.)

Salvage activities have continued on th *Atocha* to the present and in subsequent proceedings the Honorable Sydney Aronovitz, United States District Judge for the

Southern District of Florida in his Final Order Extending Preliminary Injunction in this cause (No. 75-1416, S.D.Fla.), dated June 2, 1981, held that:

> The uncontroverted evidence shows that [Treasure Salvors] have exhibited a keen awareness of the historic and archaeological importance attributed in general to old wreck sites, but specifically to the Atocha and Santa Margarita sites . . . This has included substantial expenditures for such historical and archaeological services [as preserving and restoring finds], the providing of work space for archaeological personnel with storage facilities . . ., laboratories, chemicals and supplies . . . very substantial efforts have been maintained and strict control measures introduced to preserve the public interest in the protection of the historical and archaeological values associated with the finding of the Atocha and the Santa Margarita.

The State suggests that its ownership will ensure the preservation of the archaeological material on the continental shelf while private ownership will destroy it. This premise deserves comment. Adam Smith in *An Inquiry Into the Nature and Causes of the Wealth of Nations*, (U. Chi. Britannica ed. 1952) stated an opposite view:

> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is for his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society. *Id.* at 193.

"The invisible hand" guides the free enterprise system which underlies our nation. Government intervention often harms the process. The underlying thesis of the State's and Amici's interest in archaeology is the need for a state

bureaucracy. Notwithstanding that the states have limited resources for such purposes as education, law enforcement, highways and social programs, increased intervention by a multiple number of states with disparate statutes in attempts to control maritime salvage over areas *beyond* the territorial boundary of the United States cannot be justified. Whether or not the states within the territorial waters of the United States can control and regulate maritime salvage is not an issue presently before this Court.*

Friedman in *Capitalism and Freedom* (U. Chi. 1962) affirms Adam Smith's thoughts:

> Is it an accident that so many of the governmental reforms of recent decades have gone awry . . .?
> The central defect of these measures is that they seek through government to force people to act against their own immediate interests in order to promote a supposedly general interest. They substitute the values of outsiders for the values of participants; . . . These measures are therefore countered by one of the strongest and most creative forces known to man—the attempt by millions of individuals to promote their own interests, to live their lives by their own values . . . The interests of which I speak are not simply narrow self-regarding interests . . . they include the whole range of values that men hold dear and for which they are willing to spend their fortunes and sacrifice their lives . . . and devote great effort and time to charitable, educational and religious activities. Naturally, such interests are the major ones for few men. It is the virtue of a free society that it nonetheless permits these interests full scope and does not subordinate them to the narrow materialistic

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*See *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* No. 79-8266-Civ-JLK, S.D. Fla., *Order Granting Plaintiff's Motion for Preliminary Injunction,* dated October 2, 1981, for full discussion of problem.

> interests that dominate the bulk of mankind. That is why capitalist societies are less materialistic than collectivist societies.

Id. at 200.

The facts underscore this view. The plaintiffs have a major interest in searching for, finding and salvaging Spanish Treasure Ships. Gores, *Marine Salvage*, (Doubleday, 1971) at 400-404 recognizes their ability. The plaintiffs have spent nine years of research and substantial amounts of risk capital finding and salvaging this wreck. With today's straitened public budgets, the State would never have funded the search, much less commenced salvage. Treasure Salvors saved valuable resources for the public that otherwise would have been lost. To suggest that leaving these resources subject to the perils of the sea would better serve the public weal is idiocy.

By comparison, the State has *never* undertaken archaeological marine salvage and has neither plans nor a budget to do so. As the trial court notes, "there is no basis in fact for suggesting that the Division ever could have located [the *Atocha*], much less recovered it." (App. Pet. Cert. 69).

Shore, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 San Diego L. Rev. 668, 690 (1970) comments on the interests of private salvors serving the public good:

> While property rights in such finds should be subject to some sort of control, it would be unwise for a coastal state to automatically assert ownership of marine archaeological material based solely on that material's presence *within territorial jurisdiction.* Many such states lack the resources for conducting their own exploration and excavation. Private backing, then, can and does play an important role in the discovery of our archaeological heritage . . . most private backers, who acquire ownership of such material *care for it as well as,*

or better than many museums can. Private collectors of marine archaeological artifacts also take great pride—for whatever reasons—in lending their collections to museums for occasional showings. Since the ultimate goal of marine archaeology is to "illustrate and discover the course of human civilization," and since privately backed exploration and excavation can be of great assistance in ataining this goal, any property laws which would discourage such backing should be frowned upon, with the one exception for finds which a coastal state considers necessary to build up collections "fully representative of that country's civilization, history, art and architecture." (emphasis added).

Policy as well as legal considerations enforce the claim of Treasure Salvors. Had it not been for the enterprise of the plaintiffs, the wreck of the *Atocha* would still lie undiscovered and lost. "A wise and frugal government . . . shall leave men otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned—this is the sum of good government." Thomas Jefferson, Writings. See also Note, *Admiralty Law: Trial of a Treasure Hunter*, 4 Nova L. Jour. 237 (1980).

CONCLUSION

For the foregoing reason, the judgment below should be affirmed.

Respectfully submitted,

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